

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 LAVERNE RATZLAFF  
5 and MARY JEAN RATZLAFF,  
6 *Petitioners,*

7  
8 vs.

9  
10 POLK COUNTY,  
11 *Respondent.*

12  
13 LUBA No. 2006-201

14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from Polk County.

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20 Wallace W. Lien, Salem, filed the petition for review and argued on behalf of  
21 petitioners. With him on the brief was Wallace W. Lien, PC.

22  
23 David Doyle, Dallas, filed the response brief and argued on behalf of respondent.

24  
25 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
26 participated in the decision.

27  
28 DISMISSED

03/13/2007

29  
30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision of the Polk County Board of Commissioners denying petitioners’ motion to dismiss a pending appeal of an administrative approval of their applications to partition their property and for approval of a farm dwelling.<sup>1</sup>

**FACTS**

Petitioners own a 24.36-acre parcel of property located in Polk County. Petitioners applied to partition a portion of the property and for approval of a farm dwelling on one of the resulting parcels.<sup>2</sup> Polk County’s Planning Director approved both applications. Record 100-105.

The Southeast Polk Area Advisory Committee (SEPAAC) filed an appeal of the planning director’s approval. Record 92-95. Polk County Ordinance 00-15 exempts certain Area Advisory Committees (AAC’s), as defined in the ordinance, from payment of the usual filing fee for a local appeal. It is undisputed that SEPAAC’s appeal was not accompanied by a filing fee.

At the first public hearing on the appeal on June 21, 2006, petitioners filed a “Motion to Dismiss Appeal,” arguing that SEPAAC did not qualify as an AAC entitled to a free appeal under Polk County Ordinance 00-15, and that failure to pay the filing fee required that the county dismiss SEPAAC’s appeal. Petitioners requested that the board of commissioners dismiss SEPAAC’s appeal and declare the planning director’s administrative decision to be the final decision of the county.

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<sup>1</sup> This appeal was transferred to LUBA from the Polk County Circuit Court under ORS 34.102(3). Record 262-266.

<sup>2</sup> In a separate action, petitioners received a waiver under ORS 197.352 of certain restrictive land use regulations from the Land Conservation and Development Commission and from Polk County. Record 142-144.

1           The board of commissioners responded to the motion to dismiss by indicating to the  
2 parties that they would take the motion to dismiss under advisement. Petition for Review 3.  
3 The hearing on the appeal of the planning director’s decision continued, and SEPAAC  
4 provided evidence and testimony in support of its appeal. Petition for Review 3. Petitioners  
5 did not present evidence regarding the appealed decision. At the conclusion of the hearing,  
6 the board of commissioners continued the hearing on the appeal to its first meeting in  
7 August, 2006. Petition for Review 4.

8           On July 12, 2006, a decision entitled “Decision on Motion to Dismiss Pending  
9 Appeals” was issued, denying petitioners’ motion to dismiss.<sup>3</sup> Record 44-45. Petitioners  
10 filed a writ of review in Polk County Circuit Court, seeking an order reversing the decision  
11 of the Board of Commissioners denying petitioners’ appeal and declaring the planning  
12 director’s decision approving the application to be the county’s final decision. Polk County  
13 filed a motion to dismiss the writ of review and direct transfer to LUBA. The circuit court  
14 denied the writ of review, and transferred the writ to LUBA pursuant to ORS 34.102(3).<sup>4</sup>  
15 Record 262-266.

16 **JURISDICTION**

17           As a threshold matter, we address the issue of whether the board of commissioners’  
18 July 12, 2006 “Decision on Motion to Dismiss Pending Appeals” was a “final” land use

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<sup>3</sup> Petitioners argue in their petition for review that the county committed procedural errors in making its decision denying the appeal. One of those alleged procedural errors is that the decision was improperly rendered by the chair of the board of county commissioners, rather than by a majority vote of the entire board. Because of our disposition of the appeal, we need not address that issue.

<sup>4</sup> ORS 34.102(3) provides:

“A petition for writ of review filed in the circuit court and requesting review of a land use decision or limited land use decision as defined in ORS 197.015 of a municipal corporation shall be transferred to the Land Use Board of Appeals and treated as a notice of intent to appeal if the petition was filed within the time allowed for filing a notice of intent to appeal pursuant to ORS 197.830. If the petition was not filed within the time allowed by ORS 197.830, the court shall dismiss the petition.”

1 decision. Under ORS 197.015(11), this board has jurisdiction over the decision only if the  
2 decision was “final.”<sup>5</sup>

3 In *Riddell Farms, Inc. v. Polk County*, 41 Or LUBA 47 (2001), in reviewing facts  
4 remarkably similar to the facts presented in this case, we determined that the county’s denial  
5 of a party’s motion to dismiss an appeal of a hearings officer’s decision to the board of  
6 commissioners was not a final decision that was appealable to LUBA, notwithstanding  
7 language in the decision stating that the decision was immediately appealable and that the  
8 failure to appeal would preclude further consideration of the issue. We held that the county  
9 could not convert an interlocutory decision into a final land use decision merely by  
10 designating it as such, and that the final decision would occur when the county concluded its  
11 proceedings on the appeal to the board of commissioners. Similarly, in *Besseling v. Douglas*  
12 *County*, 39 Or LUBA 177, 180-81 (2000), we held that a local government’s attempt to  
13 separate components of a land use application into final and non-final decisions directly  
14 conflicted with ORS 197.015(10) (now 197.015(11)), and found that that the local  
15 government’s decision was not final regarding any issues.

16 The county’s denial of the motion to dismiss in this case is part of the county’s  
17 consideration of petitioners’ partition and farm dwelling applications, and is an interlocutory  
18 decision in that proceeding. See *Riddell Farms*, 41 Or LUBA at 50 (only when the county  
19 proceedings on the local appeal are complete will the county have made its final decision on

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<sup>5</sup> ORS 197.015(11)(a)(A) defines “land use decision” as:

“a *final* decision or determination made by a local government \* \* \* that concerns the adoption, amendment or application of:

“(i) the goals;

“(ii) [a] comprehensive plan provision;

“(iii) [a] land use regulation; or

“(iv) [a] new land use regulation.” (Emphasis added.)

1 the application). As such, it is not a “land use decision” as that phrase is used in ORS  
2 197.015(11)(a)(A), and is not appealable.

3 Although no party cites ORS 34.102(5) or argues that the statute applies in this case,  
4 we nevertheless consider that possibility. ORS 34.102(5) provides:

5 “In any case in which the Land Use Board of Appeals or circuit court to which  
6 a petition or notice is transferred under subsection (3) or (4) of this section  
7 disputes whether it has authority to review the decision with which the  
8 petition or notice is concerned, the board or court before which the matter is  
9 pending shall refer the question of whether the board or court has authority to  
10 review to the Court of Appeals, which shall decide the question in a summary  
11 manner.”

12 We believe ORS 34.102(5) applies in a circumstance where the circuit court believes LUBA  
13 has jurisdiction to review a decision, and LUBA believes the circuit court has jurisdiction  
14 over that decision. Our disagreement with the circuit court is not over whether LUBA or the  
15 circuit court will ultimately have jurisdiction to consider whether the county erroneously  
16 denied petitioners’ motion to dismiss. Our disagreement with the circuit court is over  
17 whether the county’s decision satisfies the finality requirement in ORS 197.015(11)(a) so  
18 that we may consider that question now. We think LUBA will have jurisdiction to review  
19 the county’s interlocutory decision to deny petitioners’ motion to dismiss as part of our  
20 review of the county’s final decision on petitioners’ applications, assuming petitioners or  
21 SEPAAC appeal the county’s final decision in this matter to LUBA. In that circumstance,  
22 we do not believe referral to the Court of Appeals is appropriate or required by ORS  
23 34.102(5).

24 The appeal is dismissed.